LAW PIK TAI

v.

WONG NYIIK FOON

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[ORIGINATING SUMMONS NO: 24-83-2001]
28 MARCH 2002

LAND LAW: *Caveat - Private caveat - Application for removal - Sarawak Land Code (Chapter 81), s. 177 - Caveat lodged by wife against parcels of land - Test for removal of caveat - Luggage Distributors - Whether there were sufficient grounds to support lodgement of caveat - Whether wife has caveatable interest - Whether said lands were matrimonial assets - Law Reform (Marriage and Divorce) Act 1976 - Serious questions to be tried based on affidavits filed - Whether exists - Balance of convenience - Whether supports removal of caveat*

Under s. 177 of the Sarawak Land Code ('the Code') the plaintiff applied to this court for the removal of a caveat lodged by his wife, the defendant, against four parcels of land ('the said lands'). The defendant asserted her rights over the said property by alleging that they were matrimonial assets and claimed, *inter alia*, that the plaintiff had planned to dispose of the said lands without her knowledge or consent. The plaintiff denied that the said lands constituted matrimonial assets and submitted that he had acquired the said lands from his own resources for property development purposes.

Held:

[1] The defendant's statutory declaration did not indicate that she had contributed or laid out any sums of money in the purchase of the said lands, or set out the facts or any other circumstances which gave rise to some kind of trust expressed or which could be implied by law which would create or tend to create some kind of "interest" in the said property. (p 493 d-e)

[2] Under s. 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), the jurisdiction to order the division of any assets acquired by the parties to the marriage is exercised only when granting a decree of divorce of judicial separation and even then, only after the court has addressed its mind to the considerations stated in sub-ss. (2), (3), (4) and (5) of s. 76. The mere possibility of the court exercising the jurisdiction under the Act to make an order for a division or settlement of division of assets does not create an estate or interest in land capable of supporting a caveat under s. 173 of the Code. (pp 494 h-i & 495 c-d)

[3] Although the right of a wife to claim for a division of matrimonial assets is a right which may affect or concern land and eventually even entitle a wife transfer thereof or to the proceeds thereof, yet the rights is not a presently enforceable right in land but one that was contingent and which would only become enforceable at a later date. (p 496 a)

[4] The grounds stated in the defendant's caveat and statutory declaration were insufficient in law to support her claim to a caveatable interest in the said lands and her caveat must be accordingly removed. (p 498 e)

[5] The balance of justice did not tilt in favour of maintaining the caveat. The defendant did submit that she intended to divorce the plaintiff. However, despite the defendant's repeated assertions about the right to have her claim to a division of the matrimonial assets by the court in a divorce proceedings and that the caveat should therefore remain in place to preserve the status quo, the fact remained that she had not commenced the very proceedings by which her rights under s. 75 of the Act would be determined. (p 500 c)

[6] The defendant, however, was not without remedy. She could apply for an injunction under s. 102 of the Act to prevent the disposition of the property pending any matrimonial proceedings.

[Plaintiff's application to remove caveat granted with costs.]

Case(s) referred to:

Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
Ching Seng Woah v. Lim Shook Lin [1997] 1 CLJ 375 ***(refd)***
Goh Paik Swan v. Ng Choo Lum [1997] 1 CLJ 77 ***(refd)***
Goo Hee Sing v. Will Raja & Anor [1994] 1 CLJ 255 ***(foll)***
Guardian Trust and Executors Company of New Zealand Ltd v. Hall [1938] 57 NZLR 1020 ***(refd)***
Kho Ah Soon v. Duniaga Sdn Bhd [1996] 2 CLJ 218 ***(refd)***
Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 ***(refd)***
Lee Ah Thaw & Anor v. Lee Chun Tek [1978] 1 MLJ 173 ***(refd)***
Lee Chiu Hing v. Loh Hua Ing [1981] The Summons ***(refd)***
Lo Nyuk Lin v. Susanna Marjoribanks [1999] 3 MLJ 341 ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng [1995] 2 CLJ 713
Mohamed Oki v. Lau Hieng Ming [1981] 2 MLJ 88 ***(foll)***
Mosbert Bhd v. Stella D'Cruz [1985] 2 MLJ 446 ***(refd)***
National Provincial Bank Ltd v. Ainsworth [1965] 2 All ER 472 ***(refd)***
Re Week's Caveat [1971] QWN 4 ***(refd)***
Robert Sim Teck Hock v. Koperasi Wanita Sarawak Bhd & Anor [2000] 8 CLJ 528 ***(dist)***
Tan Suan Heoh v. Lim Teck Ming & Ors [1987] 2 MLJ 466 ***(dist)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 75, 76(2), (3), (4), (5)
National Land Code, s. 327(1)
Sarawak Land Code (Chapter 81), ss. 173, 174(1), 177(1)

Matrimonial Causes Act 1959-1966 [Australia], s. 86(1)

For the plaintiff -Wong Siong Tung; M/s Tan, Yap & Tang
For the defendant - Frank Tang; M/s Tang & Partners

Reported by M Maheswaran

JUDGMENT

Clement Skinner J:
This is the hearing of an application by the plaintiff who is the registered proprietor of four (4) parcels of land hereafter described, for the removal of a caveat lodged against those lands by his wife the defendant herein. The lands against which the caveat is lodged are:

(1) Lot 2578 Block 48 Sarikei Land District;

(2) Lot 2579 Block 48 Sarikei Land District;

(3) Lot 886 Block 48 Sarikei Land District;

(4) Lot 887 Block 48 Sarikei Land District.

(The abovementioned parcels are hereafter referred to as "the said lands").

The defendant's caveat is actually lodged against five (5) parcels of land owned by the plaintiff at Sarikei but the plaintiff does not seek to remove the caveat lodged against the fifth parcel known as Lot 2576 Block 48 Sarikei Land District. The defendant is already the registered proprietor of a one-ninth (1/9) undivided share in that parcel of land on which the matrimonial home is apparently constructed.

The caveat lodged against the said lands was registered on 3 November 2000 as Instrument No. L.3582/2000 at the Sarikei Land Registry Office. In her caveat which is dated 30 October 2000, the defendant gave notice that she was "claiming to be entitled to or to be beneficially interested in" the said lands "by virtue of the reasons stated in the statutory declaration" annexed to the caveat which was marked "A".

In her statutory declaration affirmed on 27 October 2000 in support of her caveat, the defendant asserted the following grounds in support of her claim to an interest in the said lands: that she is the lawful wife of the plaintiff

(in para. 1); that the said lands were acquired during her marriage to the plaintiff (in para. 2); that the plaintiff had not only beat her severely on several occasions but had also threatened to leave her due to his infidelity (in para. 4); that the plaintiff had already sold a few of the matrimonial assets without her knowledge and had squandered the proceeds on his philandering pursuits and was even threatening to sell the matrimonial home (in para. 5); that the plaintiff intended, without her knowledge or consent, to dispose of or deal with the said lands which she is entitled to and have a beneficial interest in "by virtue of the Law Reform (Marriage and Divorce) Act 1976" (in para. 6); that in the premises, she verily believed that she has a caveatable interest in the said lands (in para. 7).

When the plaintiff applied to remove the defendant's caveat, he affirmed an affidavit in support of it (on 25 May 2001) in which he denied that the said lands are matrimonial assets. According to the plaintiff, the said lands were acquired by him from his own resources for property development purposes. The plaintiff also disclosed that he had plans to develop two parcels of the said lands, namely Lot 886 and Lot 887, Block 48 Sarikei Land District into a commercial and hotel development which plans the defendant's caveat was interfering with. The plaintiff also denied the allegations of infidelity made against him by the defendant.

The plaintiff's application to remove the defendant's caveat and the contents of his affidavit of 25 May 2001 gave rise to two affidavits affirmed by the defendant in response thereto. In an affidavit affirmed by her on 18 July 2001, the defendant asserted that the said lands are matrimonial assets "as their acquisitions were financed by the earnings from the pepper and vegetable farms minded by me during our marriage". According to the defendant, the earnings from the pepper gardens were utilised by the plaintiff to pay for the premium due to the State Government for agricultural land alienated to the plaintiff. The defendant alleges, but without identifying which land she was referring to, that in the late 1970s the plaintiff sold "part of the land acquired by us" to raise capital to venture into property development and that the plaintiff built eight units of houses on "our land" in Sarikei, a few of which were sold and part of the proceeds of which was used by the plaintiff to invest in Lots 886 and 887 Block 48 Sarikei Land District which the plaintiff is now intending to develop for commercial and hotel purposes. The defendant also gave details of the plaintiff's infidelity in her affidavit of 18 July 2001 and stated that she had instructed her advocates to file for divorce from the plaintiff and to seek a property division order from the matrimonial court.

In response to the defendant's affidavit of 18 July 2001, the plaintiff affirmed an affidavit on 2 August 2001 in which he categorically denies that the said lands were financed from the earnings of the pepper gardens as alleged by the defendant. The plaintiff then set out his version of how the said lands were acquired through his own efforts.

On 13 August 2001, the defendant affirmed an affidavit to refute the plaintiff's version of how the said lands came to be acquired and gave details of how she tended to the pepper gardens as well as looked after and brought up the eight children of the family. I should also mention that in her two affidavits of 18 July 2001 and 13 August 2001, the defendant made reference to the assistance received by the plaintiff in his business as a developer, from two sons of the marriage. One of the sons, namely, Martin Lau Chiong Ming has affirmed two affidavits to oppose what the plaintiff has said about his developing the said lands through his own efforts.

Before I proceed to consider the merits of this application, I wish to deal with the law relating to the onus and standard of proof that lies upon the parties to such an application. Section 177(1) of the Sarawak Land Code (Chapter 81) (hereafter the "Sarawak Land Code") provides the procedure for the removal of a caveat and states that:

> (1) Any registered proprietor or any other person having a registered estate or interest in the estate or interest against which a caveat has been lodged, may at any time, if he thinks fit, apply to the High Court for an order that the caveat be removed.

In *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212 at p. 215, Lord Diplock in delivering the advice of the Board in an application for removal of a caveat under s. 327(1) of the National Land Code stated that where the person applying for the removal is the registered proprietor of the land (ie, the caveatee), as the plaintiff in the present case is, he can, as caveatee, "rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so."

In a latter part of his advice, Lord Diplock described the nature of the *onus* on a caveator in the following terms:

> (H)e must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing his land to some third party.

What was stated in *Eng Mee Yong*'s case by Lord Diplock was followed and applied in an application for the removal of a caveat under s. 177 of the Sarawak Land Code by Tan Chiaw Thong J in *Mohamed bin Oki v. Lau Hieng Ming* [1981] 2 MLJ 88. In that case his Lordship said:

> In my judgment, the provisions of section 327 of the National Land Code are substantially similar to those in section 177 of our Land Code, so that the above decisions in the *Nanyang Development*'s case and *Eng Mee Yong*'s case quite clearly apply to applications made under section 177 of our Land Code.

I respectfully agree with the views expressed by his Lordsdhip.

More recently, in *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng* [1995] 3 CLJ 520, the Court of Appeal has established the approach which a court must take when hearing an application under s. 327 of the National Land Code for the removal of a private caveat. In doing so, the Court of Appeal (per Gopal Sri Ram JCA) referred to the decision in three cases, namely, *Eng Mee Yong v. Letchumanan (supra), Mosbert Bhd. v. Stella D'Cruz* [1985] 2 MLJ 446 (SC), and *Kumpulan Sua Betong Sdn. Bhd. v. Dataran Segar Sdn. Bhd.* [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 and then concluded (at p. 535):

> ... there are three stages through which an inquiry of this nature must go. The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going any further.

As to the second stage, his Lordship said (at p. 536):

> The matter does not come to an end once the caveator satisfies the court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that has to be offered will, of course, vary from case to case.

And as to the third stage, his Lordship said (at p. 537):

> The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong* as 'the balance of convenience'. As to the matters that go to determine in which direction the balance should tilt, these have already been set out in such clear terms by Lord Diplock in *Eng Mee Yong* that mere repetition becomes unnecessary.

> It is only upon satisfying these three stages of curial scrutiny that a caveat may be permitted to remain. That this should be so is only logical; for it is a serious matter to caveat a person's property, and unless a case is properly made out, a caveat ought not to be permitted to remain on the register a moment longer than is absolutely necessary.

Although the Court of Appeal was there referring to the approach to be taken by a court hearing an application for the removal of a caveat under s. 327 of the National Land Code, in my judgment that same approach must be taken by a court when hearing an application under s. 177 of the Sarawak Land Code. The effect of a private caveat lodged against land situated in Sarawak under the provisions of the Sarawak Land Code is the same and cannot be any less serious than a private caveat lodged against land situated in West Malaysia under the provisions of the National Land Code and ought not to be permitted to remain on the register any longer than absolutely necessary, unless a case is properly made out for allowing it to do so.

With that I turn to consider each of the three stages of curial scrutiny which the defendant must satisfy before her caveat can be allowed to remain on the register. I begin first by examining the grounds expressed in the defendant's application for the caveat to determine whether they disclose a caveatable interest. The provisions of the Sarawak Land Code that are relevant to this stage of enquiry are ss. 173 and 174 and they read:

Caveat against dealing

173. Any person:

(a) claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or transmission, or of any trust express or implied or otherwise howsoever, or by virtue of a licence issued pursuant to section 65B of the Forestry Ordinance for the establishment of a planted forest;

(b) who is a guardian of the property of an infant beneficially interested in any land or any estate or interest therein; or

(c) transferring any estate or interest under this Code to any other person to be held in trust,

may at any time lodge with the Registrar a caveat in Form O in the First Schedule.

Particulars to be stated

174. (1) Every caveat shall be signed by the caveator, or by his attorney or agent, and shall state with sufficient certainty the nature of the estate or interest claimed by the caveator and how it is derived from the proprietor. It shall also appoint a place or give an address, within Sarawak at or to which notices and proceedings relating to the caveat may be served or addressed.

(2) Every caveat shall be entered upon the Register as of the date and hour of the reception thereof by the Registrar.

From the statutory declaration affirmed by the defendant in applying for her caveat, it is plain to see that the only basis on which she claims to be entitled to or to be beneficially interested in the said lands is that they were acquired during her marriage to the plaintiff and thus are matrimonial assets to which she claims a beneficial interest by virtue of the Law Reform (Marriage and Divorce) Act 1976 (hereafter 'the Act').

Counsel for the plaintiff has pointed out, and correctly in my view, that there is no assertion or averment in the defendant's statutory declaration that she had contributed or laid out any sums of money in the purchase of the said lands or set out facts or any other circumstances giving rise to some kind of trust expressed or which could be implied by law which would create or tend to create some kind of "interest" in the said lands. There is nothing of that sort here. According to counsel for the plaintiff, and again I agree with him, the caveat was lodged by the defendant merely because she asserted in her statutory declaration that the said lands were matrimonial assets to which she claimed a beneficial interest in by virtue of the Act.

It is the contention of the plaintiff that the mere claim by a wife to a right in the division of matrimonial assets in a divorce or separation proceedings under the Act does not create an estate or interest in land which may form part of those matrimonial assets capable of supporting a caveat under s. 173 of the Sarawak Land Code.

Since the defendant's claim to a beneficial interest in the said lands is founded on the Act, it will be convenient to refer to the relevant provisions of that Act on which she relies.

The power of the court to order a division of matrimonial assets is found in Part VII of the Act which relates to "Matters Incidental To Matrimonial Proceedings". Section 76 of the Act gives the court power when granting a decree of divorce or judicial separation, to order division of matrimonial assets between the parties.

Section 76 provides:

> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subsection (1) the court shall have regard to:
>
> (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets.
>
> (b) any debts owing by either part which were contracted for their joint benefit;
>
> (c) the needs of the minor children, if any, of the marriage,
>
> and subject to those considerations, the court shall incline towards equality of division.
>
> (3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (4) In exercising the power conferred by subsection (3) the court shall have regard to:
>
> (a) the extent of the contribution made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;
>
> (b) the needs of the minor children, if any, of the marriage;
>
> and subject to those consideration, the court may divide the assets or proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive the greater proportion.
>
> (5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

A striking feature of s. 76 as clearly appears from its terms is that the jurisdiction to order the division of any assets acquired by the parties to the marriage is exercised, only when granting a decree of divorce of judicial separation and even then, only after the court has addressed its mind to the considerations stated in sub-s. (2), (3), (4) and (5) of s. 76. The discretion

vested in the court on the exercise of that jurisdiction is very wide. Thus, the court may order settlement or division of the matrimonial assets whether acquired by the joint efforts of both parties to the marriage or through the sole effort of one party only and in the proportion to be decided by the court on the evidence before it. The court may also, if the matrimonial assets consist of land, order a division of it or the court may not and instead order a sale of the land and division of the proceeds thereof or the court may even decide in the exercise of its jurisdiction not to make any order at all in respect of the matrimonial assets.

It can therefore be seen that the right of a spouse to obtain an order for distribution of matrimonial assets under the Act are not certain at all and, in my judgment, the mere possibility of the court exercising jurisdiction under the Act to make an order for a division or settlement of matrimonial assets does not create an estate or interest in land capable of supporting a caveat under s. 173 of the Sarawak Land Code. In support I refer to *Re Week's Caveat* [1971] QWN 4. In that case the wife filed a matrimonial petition seeking dissolution of her marriage to her husband and also for a settlement in her favour of her husband's interest in a house which she resided in as the matrimonial home under the provisions of the Matrimonial Causes Act 1959-1966, Australia. On that basis, the wife lodged a caveat against the property. Under s. 86(1) of the Matrimonial Causes Act 1959-1966, Australia, disputes between parties to the matrimonial cause as to the beneficial ownership of property vested in one or both of them or in a trustee for one or both of them can be determined in the matrimonial cause. Under that Act, the court also had power in an appropriate case, although one of the parties has no legal or equitable right to property vested in the other, or to any greater interest in property then is already wholly or partially vested in him or her, to make an order settling that property on that one or increasing the beneficial interest of that one in the property already wholly or partially vested in him or her as the case may be. The court held that the mere possibility of the court exercising jurisdiction under the Matrimonial Causes Act to make an order for settlement of the property in favour of a wife is not an estate or interest in the land capable of supporting a caveat.

I am aware that the provisions of s. 86(1) of the Australian Matrimonial Causes Act 1959-1966 are only similar to s. 76 of our Law Reform (Marriage and Divorce) Act 1976 but I regard the rational in that case where the wife relied on provisions of matrimonial legislation similar to ours to lodge a caveat against land under a Torrens System of land registration similar to ours, of relevance and assistance in arriving at a decision here.

It is also my view that although the right of a wife to claim for a division of matrimonial assets is a right which may affect or concern land and eventually even entitle a wife to a transfer thereof or to the proceeds thereof, yet the right is not a presently enforceable right in land but one that is contingent and which may only become enforceable at a future date. In *Goo Hee Sing v. Will Raja & Anor.* [1994] 1 CLJ 255, the issue before the court was whether in the face of a restriction in interest indorsed on the title to the disputed land, the caveat filed by the plaintiff there was a nullity. In answering that question, Shankar J (as he then was) held that in order for the plaintiff to file a caveat, he must have a title to land or a right thereto *'in praesinti'* and not to some contingent title or right thereto *'in futuro'* and that until the consent of the 'pihak kuasa negeri' was first irrevocably obtained, a prospective purchaser can have no caveatable interest in such land. I respectfully agree with the reasoning there and would regard the claim of the defendant here to a right in the division of the said lands as a contingent right *'in futuro'* and not capable of supporting a caveatable interest in land.

It is also my view that the right of a wife to claim for a division of the matrimonial assets under the Act, being an unascertained right until an order is made by the court when granting a divorce or judicial separation, cannot be in any better position than the right of a residuary beneficiary under the will of a deceased who lodges a caveat against land belonging to the estate and where it has been held on high authority that residuary beneficiaries are not "entitled to" or "beneficially interested in" land forming part of an estate and therefore do not have a caveatable interest inland belonging to the :tate until the administration of the estate is complete and the residue fully ascertained. See *Lee Ah Thaw & Anor. v. Lee Chun Tek* [1978] 1 MLJ 173 at p. 176 para. 'D' per Lee Hun Hoe CJ who followed and applied the decision in *Guardian Trust and Executors Company of New Zealand Ltd. v. Hall* [1938] 57 NZLR 1020.

It will be apparent from what I have said so far that in this first stage, my examination of the grounds relied on by the defendant to sustain her caveat are confined to the grounds expressed in her caveat and statutory declaration. In his submissions, learned counsel for the defendant stated that the defendant should also be allowed to rely on what she had stated in her supporting affidavits in addition to her statutory declaration. The reason for counsel's submission is that it is in her affidavits of 18 July 2001 and 13 August 2001 respectively that the defendant alleges that the acquisition of the said lands were financed by the earnings from the pepper gardens minded by her during the marriage in that the premium for the alienation of the said lands by the Government to the plaintiff were paid from those earnings. On that basis,

counsel for the defendant submitted that the defendant's claim to a beneficial interest in the said lands arises from an implied trust, being matrimonial assets acquired by the plaintiff during the subsistence of her marriage to the plaintiff.

Counsel for the plaintiff objected to the defendant's attempt to rely on her affidavits at this stage of the enquiry as her claim to an interest in the said lands as stated in her statutory declaration is merely that the said lands are matrimonial assets and her claim is by virtue of the Act. It is his submission that it is not permissible for the defendant in the instant application in order to sustain her caveat to rely on any other basis such as an implied trust through her allegations of her contribution in the payment of the premiums to the State Government for the alienation of the said lands to the plaintiff, which were not stated in her caveat or her statutory declaration and neither was any mention made therein of the fact that the plaintiff held the said lands on any kind of trust for her benefit.

I find merit in the contention of counsel for the plaintiff. In the first place, s. 174(1) of the Sarawak Land Code requires that every caveat "shall state with sufficient certainty the nature of the estate or interest claimed" and "how it is derived from the proprietor". In the second place, the court in *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng (supra)* has every clearly laid down that at the first stage of enquiry, the court is to examine the grounds expressed in the application for the caveat to see whether they show a caveatable interest. In *Goh Paik Swan v. Ng Choo Lum* [1996] 3 MLJ 437 the caveator based his claim to caveatable interest on a document which he described as an "option" to purchase certain land. However, there was no sale and purchase agreement either negotiated or executed by the parties. In the affidavit filed to oppose an application for removal of the caveat, the caveator alleged that document concerned was an agreement made. The caveator also went on to say that if the document was to be construed as an option, then, he had duly exercised it. The High Court allowed the caveat to remain. The Court of Appeal in allowing the appeal by the caveatee held that because the basis of the caveator's claim to the interest in land stated in the caveat rested on an option, it was for him to satisfy the court that he had exercised the option in the manner prescribed therein, or that he had been prevented by the caveatee from doing so. It was not open to the caveator to contend that the document concerned was not an option but an enforceable agreement. The court held that it was not permissible for a caveator entering his caveat upon one ground and later, on finding that that ground was unsustainable, seeking to sustain the caveat on some other alternative ground.

For the reasons stated above, I cannot refer to the defendant's affidavits at this stage of the inquiry.

Counsel for the defendant has referred me to two cases in which affidavits of the caveator were referred to during the hearing of an application for the removal of a caveat. In my view, they are of no assistance to the defendant on this point. In *Lo Nyuk Lin v. Susanna Marjoribanks* [1999] 3 MLJ 341 the court did not at all consider the application for removal of the caveat according to the three-stage test laid down in *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng (supra).* The court there looked to see if there were serious questions to be tried which the court found there were as the caveator had shown that she had an equitable interest in the lands by her contributions to the loans financing the purchase of the lands thereby giving her a caveatable interest in the said lands. In our case, I am at the first stage of inquiry and no evidence of the nature disclosed in *Lo Nyuk Lin*'s case is before me. In *Lee Chiu Hing v. Loh Hua Ing @ Loh Kiu Ing* [1981] The Summons, the court found that the caveator had stated in her application for her caveat not only that the land in question was matrimonial property but also that she had contributed substantially towards its purchase. Again, in our case, no such evidence is before me at this stage of inquiry.

For all the reasons stated above, it is my judgment that the grounds stated in the defendant's caveat and statutory declaration are insufficient in law to support her claim to a caveatable interest in the said lands and her caveat must accordingly be removed without the necessity of going any further.

Lest I be misunderstood and at the expense of some repetition, I am not here saying that a petitioner in matrimonial proceedings who can show some actual interest in land or a claim thereto and in respect of which an order for distribution is sought cannot lodge a caveat to protect that interest because as pointed out in *Re Week's Caveat (supra)* it may well be that there are many circumstances in which a petitioner to matrimonial proceedings who can show that she has some actual legal or equitable interest in property, for example by having laid out money in the purchase of the property or by pointing to some other circumstances which would create or tend to create some kind of "interest" in the land which needs to be protected by caveat. What I am saying is that in our case, the defendant's caveat and statutory declaration just does not disclose such circumstances.

I should also point out that counsel for the plaintiff referred me to the case of *National Provincial Bank Ltd. v. Ainsworth* [1965] 2 All ER 472 where the House of Lords held that a deserted wife's right to occupation of a matrimonial house is merely a personal right of a wife against a husband and did not confer on the wife any equitable interest or right of property in land. I did not find it appropriate to refer to or rely on what was said in that case in the light of what our Court of Appeal said on being referred to it, in *Ching*

Seng Woah v. Lim Shook Lin [1997] 1 CLJ 375 at p. 391, about the differences between social and cultural aspirations with regard to marriage, divorce and welfare in England and Malaysia being such "that much caution is called for before we adopt modern English attitudes."

If I am wrong in saying that the mere possibility of the court exercising jurisdiction under the Act to make an order for division of matrimonial assets under s. 75 does not create an estate or interest in land capable of supporting a caveat under s. 173 of the Sarawak Land Code, I now proceed to the second stage of inquiry. In my view, what has been stated by the defendant in her two affidavits of 18 July 2001 and 13 August 2001 respectively do show that the defendant's claim to have contributed to the acquisition of the said lands does disclose a serious question meriting further inquiry at a trial. The assertions made by the defendant regarding her contributions to the acquisition of the said lands through income derived from the pepper gardens and which are all denied by the plaintiff are not suitable to be decided in a summary way on affidavit evidence alone.

Going on to the third stage of inquiry, it is my judgment that the balance of justice does not tilt in favour of maintaining the caveat and I say so for the following reasons. The caveat herein was put on the registrar on 3 November 2000. From what the defendant had stated in her statutory declaration, she was clearly aware of the prejudice which her alleged interest in the said lands was exposed to by the threatened behaviour of the plaintiff and in her affidavit of 18 July 2001, the defendant stated that she had instructed her advocate to file for divorce from the plaintiff and to seek a property division order from the matrimonial court. In submissions, counsel for the defendant when addressing the court on whether there is a serious question to be tried also stated that "pending a divorce or other matrimonial proceedings for a property division order under s. 76 of the Law Reform (Marriage and Divorce) Act, I humbly submit that the removal of the caveat would cause grave injustice to the defendant should the plaintiff dispose of the assets before such a property division order is obtained." Counsel also said "In caveating the said Sarikei lands, the defendant is seeking a fair chance to be heard of her entitlements to all the matrimonial assets obtained during the marriage. This in itself is a serious question to be tried in the upcoming matrimonial proceedings."

Again, when addressing the court on the balance of convenience, counsel for the plaintiff stated "the defendant is entitled to a fair apportionment of the total matrimonial properties through a divorce or matrimonial proceedings. This is because as part of the overall matrimonial assets, the entitlement of the defendant to a share of the caveated lands certainly requires proper "ventilation" at a proper trial and in the forthcoming divorce proceedings."

Counsel also stated "Hence, it is my humble submission that the justice of the case demands that the said Sarikei lands should remain caveated until proper disposal by the court in the course of divorce or matrimonial proceedings." And counsel ended his submissions by citing the following passage from the case of *Kho Ah Soon v. Duniaga Sdn. Bhd.* [1996] 2 CLJ 218:

> The civil suit ought to be allowed to be heard without it being rendered futile by the removal of the private caveat in question. The private caveat ought to remain until the disposal of the civil suit for maintaining the *status quo*.

Despite the defendant's repeated assertions about her right to have her claim to a division of the matrimonial assets determined by the court in divorce or matrimonial proceedings and that the caveat should therefore remain in place to preserve the *status quo*, the truth of the matter is that the defendant, despite her acute awareness of the necessity for it, has not commenced the very proceedings by which her rights under s. 75 may be determined.

It is apt to refer here to what Lord Diplock had to say about the balance of convenience in *Eng Mee Yong*'s case. His Lordship said once it had been shown that there was a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence "until proceedings, brought and prosecuted timeously by the caveator ...".

I do not think the defendant has acted timeously in prosecuting her claim. The *status quo* which she hopes to maintain is that the said lands are now in effect frozen and they have been in that state since November 2000 and will continue to do so *ad infinitum* as the defendant has shown no inclination to commence the divorce or matrimonial proceedings which is the only means by which her claim under s. 75 can be adjudicated upon. In her affidavit of 13 August 2001 the defendant states that she is now staying in Australia with her son and that she will file for divorce as soon as her son can take time off from his business schedule to accompany her back to Sarawak. I do not find that an acceptable explanation for the defendant not having commenced a suit till this very day. She has clearly placed her son's business interest above all else.

I have not overlooked the intimation of the defendant that she is willing to allow the plaintiff to develop the said lands and for the disposal of houses built thereon if the proceeds of sale are paid into court. I regret I do not see how that concession can tilt the balance of convenience in favour of the defendant because on disposal of the said lands, the funds paid into court

represent those assets which will continue to remain frozen until such time as determined in divorce or other matrimonial proceedings instituted by the defendant for that purpose, which she steadfastly refuses to do.

Counsel for the defendant has in his submissions said that even if the defendant has not commenced any proceedings for the determination of the legality of her right, the court may, in order to preserve the *status quo*, direct the defendant to commence such proceedings within such period as may be prescribed by the court and has referred me to several cases where the court has done so. I see no reason at all to exercise that discretion vested in me. No acceptable reason or explanation has been given by the defendant for her delay in commencing legal action and therefore there is no basis for the exercise of discretion in her favour. In *Tan Suan Heoh v. Lim Teck Ming & Ors*. [1987] 2 MLJ 466, the court ordered the caveator to commence proceedings for specific performance of a contractual obligation. Likewise, in *Robert Sim Teck Hock v. Koperasi Wanita Sarawak Bhd. & Anor*. [2000] 8 CLJ 528, the court ordered the caveator to commence proceedings to enforce rights under a trust deed. Those cases concerned contractual rights and did not involve personal relations between husband and wife and if, for reasons best known to her, the defendant does not wish to commence matrimonial proceedings that see an end to her marriage, it would be inappropriate for the court to order her to do so. I am aware that in *Lee Chiu Hing v. Loh Hua Ing @ Loh Kiu Ing (supra)* the court did so in a matrimonial dispute, but for the reasons I have already given I would not do so.

Before concluding, I wish to say that harsh though this decision may seem, the defendant is not without a remedy. Under s. 102 of the Act the court has the power on application in any pending matrimonial proceedings to grant an injunction to prevent the disposition of property in the circumstances there described.

In the result, I grant the plaintiff's application and order the removal of the caveat against the said lands with costs to the plaintiff.